

NO. 47002-1-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SUSAN ANN CHRISTOPHER
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Kevin Hull, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove that Christopher was armed while in possession of methamphetamines with intent to deliver.
2. The prosecutor committed reversible misconduct when he informed the jury, contrary to the evidence, that the weapons were loaded in count four.

Issues Related to Assignments of Error

1. Was there insufficient evidence to establish that Christopher was armed when in possession with intent when there were merely weapons in the same household where the narcotics were stored?
2. Did the prosecutor deprive Christopher of her right to a fair trial when he told the jury that the weapons were loaded in count four and the evidence indicated that the weapons were not loaded, and where the jury found that Christopher was not armed in all of the other counts except for count four?

B. STATEMENT OF THE CASE

1. Procedural Facts

Susan Christopher was charged by amended information with three counts of delivery of methamphetamine, and one count of possession with intent to deliver while armed with a deadly weapon. CP 13-18. Christopher was also charged and convicted of two counts of simple possession, CP 13-18, 61-64, 83-93. Christopher was convicted of three counts of delivery without the “armed” sentencing enhancement, and convicted of possession with intent to deliver with the “armed” sentencing enhancement. CP61-64, 83-93.

The trial court imposed a 36 month sentencing enhancement for

being armed in count four and ordered forfeiture of property used in commission of the crimes. P 13-18. The state and trial court did not cite any statutory authority for the forfeiture.

3. Trial Facts

Christopher lived in a home on and off but pretty consistently with Brian Oleson. RP 544-45. Zach Camacho also rented a room from Christopher during 2013. RP 557-558. Oleson was present on several occasions when Melody Marvel, a confidential informant for the sheriff's department came to buy one or two leaf blowers. RP 546-47. Oleson testified that he did not witness any interactions between Marvel and Christopher. RP 546-55.

Marvel testified that she engaged in three successful controlled buys where she purchased from Christopher approximately one hundred dollars-worth of methamphetamine on three separate occasions. RP 171-226, RP 546. Following the third controlled buy, Kitsap Detectives Michael Grant, Kim Keeler, and Elizabeth Byers participated with a SWAT team to search and seize Christopher and her home. RP 68-69, 143-45, 240, 389, 430. It was dark outside during SWAT operation. RP 269, 360-62.

Gun Evidence

During the search and seizure, Oleson and Camacho were present with Christopher. RP 145, 240, 272. Keeler testified that he found an unloaded semi-automatic Beretta and a magazine clip in a fanny pack on top of clothes on a red suitcase near the foot of the bed. RP 250-54. Keeler

also found a rifle on the right side of the bedroom near a stack of clothes. RP 255. Keeler testified that he "understood" the rifle to be loaded, but would have noted in his report if a weapon was loaded. RP 252-254, 301.

During sentencing, Detective Grant read his statement that included reference to one of the guns being loaded. RP 9 (sentencing December 12, 2014). Grant noted that officer Andrews found the rifle and at some point Grant later handled the weapon after it had been secured. RP 302-04. When Grant test fired the rifle, it was dirty and the magazine would not seat properly so he had to manually load the rifle with a bullet. RP 305-06.

The state did not file a statement of probable cause in support of the amended information which included among other things the weapons enhancement. And the original statement of probable cause (attached to the information) does not mention the presence of weapons during any of the charges. CP 1-6.

Melody Marvel the CI indicated that Christopher was target shooting with a rifle during the third controlled buy in count three where the jury found that Christopher was not armed during the delivery. CP 61-64, 83-94; RP 200-01. This timely appeal follows. CP 95.

Prosecutor's Closing.

During closing argument the prosecutor argued that the police found loaded guns in Christopher's home .RP 624.

Here "armed" means that there's a firearm that is easily accessible and readily available. Basically it's close-by and it's not locked up. You'll notice in the definition it doesn't

say it has to be loaded, though at least in Count 4 on the possession with intent, each of those firearms was actually loaded.

RP 624. Keeler testified the pistol was unloaded; Grant “understood the rifle to have been loaded; but Anderson, who did not testify, actually took the rifle into evidence. RP 9 (sentencing); RP 250-54, 301-04.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE BEYOND A REASONBLE DOUBT THAT CHRISTOPHER WAS ARMED WITH A DEADLY WEAPON DURING THE COMMISISON OF COUNT FOUR: POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE.

To prove that a person is “armed” for the purpose of a deadly weapon enhancement, the weapon must be easily accessible and readily available for use, either for offensive or defensive purposes. *State v. Barnes*, 153 Wn.2d 378, 383, 103 P.3d 1219 (2005); *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). The mere presence of a deadly weapon at the crime scene is insufficient to show that the defendant is “armed”. *State v. Willis*, 153 Wn.2d 366, 371-72, 103 P.3d 1213 (2005); *State v. Schelin*, 147 Wn.2d 562, 563-64, 55 P.3d 632 (2002). There must be a nexus between the defendant, the crime, and the deadly weapon in order to find that the defendant was “armed” under the deadly weapon enhancement statute. *Valdobinos*, 122 Wn.2d at 282.

In *Valdobinos*, the defendant was convicted of delivery and possession of cocaine while armed with a deadly weapon based on the

police finding cocaine and an unloaded rifle under a bed in the defendant's home while searching for evidence. *Valdobinos*, 122 Wn.2d at 273-74, 282. The Supreme Court reversed holding that the presence of an unloaded rifle under a bed did not meet the definition of "armed" for the purpose of a deadly weapon enhancement because the weapon was not necessarily easily accessible and readily available for use, either for offensive or defensive purposes. *Valdobinos*, 122 Wn.2d at 282.

Similarly in *State v. Johnson*, 94 Wn.App. 882, 886-87, 974 P.2d 855 (1999), the Court of Appeals held where the police found the defendant in bed in the bedroom, half asleep, near heroin and within five to six feet of a gun in a coffee table, the state could not prove a nexus between the gun and the possession, "pointing out that without such a nexus, courts run the risk of punishing a defendant under the deadly weapon enhancement for having a weapon unrelated to the crime." *Johnson*, 94 Wn.2d at 888, 895.

By contrast in *Schelin*, the court affirmed a deadly weapons enhancement where the police found the defendant in the basement with marijuana and a loaded revolver on the wall- six to ten feet away from where the defendant had been standing. *Schelin*, 147 Wn.2d at 564-70.

Christopher's case is more analogous to *Valdobinos* because as in *Valdobinos*, proximity to an unloaded weapon "without more" is insufficient to show a defendant is "armed" in the sense of having a weapon accessible and readily available for offensive or

defensive purposes.” *Valdobinos*, 122 Wn.2d at 282. Similarly, as in *Johnson*, having a weapon in the bedroom where drugs are located without more does not create a nexus between the weapon and the drugs and punishes Christopher for possession not in relation to the crime charge.

Christopher was not arrested in the bedroom with the drugs or near a loaded gun, and there was insufficient evidence to establish that either weapon was loaded. Keeler testified that the pistol was unloaded and that he “understood” the rifle to be loaded but he could not testify that he knew it was loaded. RP 249, 254, 268.

Similarly, Grant read a statement during sentencing that the rifle was loaded, but he like Keeler did not secure the rifle. Rather officer Andrews who did not testify, secured the rifle and there was no evidence that the rifle was loaded. In fact, Grant testified that the rifle was so dirty that he could not use a magazine for it but had to manually load an individual bullet to conduct the test fire at the range. RP 305.

Regardless of whether the weapons were loaded, the state failed to establish the required nexus between the weapons and possession with intent to deliver in count four. Accordingly, this Court must reverse the weapons enhancement in count four.

2. THE PROSECUTOR COMMITTED MISCONDUCT BY MIS-STATING CRITICAL FACTS THAT DENIED CHRISTOPHER HER RIGHT TO A FAIR TRIAL.

Contrary the evidence, the prosecutor told the jury that the weapons were loaded in count four. The jury did not find Christopher

armed in any other count except count four.

Prosecutors are a quasi-judicial officers of the court, charged with the duty of ensuring that an accused receives a fair trial. *State v. Jones*, 144 Wn.App. 284, 289, 183 P.3d 307 (2008); *State v. Boehning*, 127 Wn.App. 511, 518, P.3d 899 (2005). To be worthy of the office, prosecutors have a duty to seek justice, not convictions. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956); *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), *citing State v. Huson*, 73 Wn.2d 660, 440 P.2d 192 (1968).

To establish prejudicial misconduct warranting a new trial, Christopher must show that the prosecutor's conduct was improper and prejudiced her right to a fair trial. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); *Jones*, 144 Wn.App. at 290. Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

This court reviews comments made in closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

When a defendant fails to object to an improper remark, she waives the right to assert prosecutorial misconduct unless the remark was so flagrant and ill- intentioned that it causes prejudice that a curative

instruction could not have remedied.” *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (*Overruled on other grounds in State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)); *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

Here, the prosecutor misstated the facts by informing the jury that the guns were loaded in count four when the evidence indicated that the pistol was not loaded and there was insufficient evidence that the rifle was loaded. RP 624. Here the prosecutor committed prejudicial, flagrant and ill-intentioned misconduct when he stated “though at least in Count 4 on the possession with intent, each of those firearms was actually loaded. “ RP 62. The jury did not find Christopher to be armed in any count other than count four. CP 83-93. This argument could not have been cured with an instruction and there is a substantial likelihood the misconduct affected the verdict because jury only found Christopher “Armed” in count four. Accordingly, to satisfy Christopher’s due process right to a fair trial, this Court must reverse and remand for a new trial.

3. THE SENTENCING COURT ERRED AND VIOLATED CHRISTOPHER’S DUE PROCESS RIGHTS WHEN THE COURT ORDERED FORFEITURE OF PROPERTY WITHOUT ANY STATUTORY AUTHORITY.

The sentencing court acted without statutory authority and violated due process in ordering forfeiture of property as a condition of Christopher’s sentence. *State v. Roberts*, 185 Wn.App. 94, 339 P.3d 995 (2014).

A sentencing court's authority to impose conditions of a sentence is limited by statute. 1 *Roberts*, 185 Wn.App. at 96. This Court reviews de novo whether the trial court had statutory authority to impose a sentencing condition. *State v. Almendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Here, there was no statutory authority cited when the trial court ordered forfeiture of Christopher's property used in connection to the crimes for which she was convicted. CP 83-93. There was in fact no discussion at all on the record regarding forfeiture. Contrary to *Roberts*, and without statutory authority, the court simply ordered: "[f]orfeit all seized property referenced in the discovery to the originating law enforcement agency unless otherwise stated." CP 83-93.

Accordingly, this Court must vacate the forfeiture order.

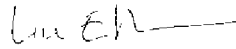
D. CONCLUSION

Susan Christopher respectfully requests this Court reverse the judgment and sentence and remand for vacation of the armed with a weapon sentencing enhancement, vacate the order of forfeiture and remand for a new trial.

DATED this 24th day of August 2015.

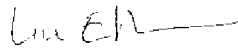
Respectfully submitted,

1 RCW 10.105.010 authorizes law enforcement agencies to seize and forfeit certain items used in relation to or traceable in specific ways to the commission of a felony, only if law enforcement serves proper notice on all persons with a known right or interest in the property, who then have a right to a hearing where they can attempt to establish an ownership right. RCW 10.105.010(3), (4) and (5). The forfeiture proceedings are held as a separate civil matter, with the deciding authority not the superior court. RCW 10.105.010(6). RCW 10.105.010 thus does not support the sentencing court taking the step of ordering, as a condition of a sentence in a criminal case, the forfeiture of property without following any of the requirements of the statute for notice, proof, a possible hearing, etc. This court must vacate the order of forfeiture because the trial court acted without statutory authority in ordering forfeiture.



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I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor kcpa@co.kitsap.wa.us and Susan Christopher DOC #397334 Washington Corrections Center for Women 9601 Bujacich Rd. NW Gig Harbor, WA 98332-8300 a true copy of the document to which this certificate is affixed, on August 24 2015. Service was made electronically to the [prosecutor and via U.S. Postal to Ms. Christopher.



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